



MONTGOMERY COUNTY ETHICS COMMISSION

Nina Weisbroth
Chair

Stuart D. Rick
Vice Chair

August 1, 2012

Advisory Opinion 12-06-008

The Arts and Humanities Council of Montgomery County (“AHC MC”) is the entity designated under the County Code to develop, promote, advocate, and coordinate efforts to support, investigate, encourage, and present arts and humanities in the County. The County provides support for the operations and activities of the AHC MC through annual appropriations.

You have inquired on behalf of the AHC MC whether implementation of a proposal received by AHC MC would create conflicts of interest under Montgomery County’s Public Ethics Law. The question you pose arises as a result of a letter (“the Letter”) sent to the Chair of the Board of the AHC MC by an individual at an arts and humanities organization on behalf of fourteen other persons at seven other arts and humanities organizations in Montgomery County. The Letter introduces several suggestions for organization and management of the AHC MC by stating:

At our meeting on April 11 representatives of the major arts organizations in Montgomery County identified aspect [sic] of your operation that have created barriers to a positive working relationship. The following are suggestions that could repair the situation.

You expressed concern about the application of §§ 19A-11 and 19A-14 to that part of the proposal in the Letter that would involve a restructuring of the Board of Directors of AHC MC to assure that it would consist of:

20% Arts organization grantee representatives, 10% Individual grantee artist representatives, 10% grantee Humanities organizations and 50% Private Sector regional corporate, philanthropic or business executives who can bring significant private or institutional assets and talents to the table. . . .

As discussed further below, the proposed restructuring of the Board would create risks of violations of the Public Ethics Laws’ conflict of interest provisions.

Montgomery County Ethics Commission

100 Maryland Avenue, Room 204, Rockville, MD 20850
OFFICE 240-777-6670, FAX 240-777-6672

The enabling legislation for the AHCMC indicates that the AHCMC's officers and directors are to be treated as "public employees" for purposes of the conflict of interest provisions of §§ 19A-11 and 19A-14 for any matter in which the person participates for the AHCMC.¹

Sections 19A-11(a)(1) and (2) contain the relevant prohibitions of Public Ethics Law concerning certain conflicts of interest. Section 19A-11(a)(1) provides, among other things, that unless permitted by a waiver, a public employee must not participate in any matter that would affect an entity with which the employee has an economic interest (such as a source of income). Section 19A-11(a)(2)(A) provides that without a waiver, a public employee must not participate in any matter where the employee knows or reasonably should know that any party to the matter is an entity in which the public employee is an officer, director, trustee, partner, or employee.² These restrictions extend to interests of relatives and certain other property and business interests.

These provisions of law apply to the AHCMC board of directors and its officers and executive director. Your inquiry is not specific as to the activities of the AHCMC Board of Directors, and as a result, only generic advice can be given as to how the organizational structure for the AHCMC proposed in the Letter might cause conflicts of interest.

As a general matter, the Public Ethics Law is designed to promote the impartial exercise of judgment of public employees. The notion of public employees acting as representatives of

¹ The Public Ethics Laws would not impose the conflict of interest restriction to members of an AHCMC membership organization who are not directors or officers of AHCMC because they would not be considered Public Employees under the Public Ethics Law. In this regard, the Ethics Commission notes that the AHCMC's enabling statute at § 5A-4(c) provides that the AHCMC "may provide for separate classes of membership for organizations and individuals to recognize and give representative weight to the size and nature of the interests a member represents. . . ."

² There is a very limited exception to § 19A-11(a)(2)(A) for:

a public employee who is an officer, director, or trustee of an organization, if the public employee discloses the relationship, is not compensated by the organization, and has no:

- (A) managerial responsibility or fiduciary duty to the organization;
- (B) authority to approve the organization's budget;
- (C) authority to select any officer or employee of the organization; or
- (D) authority to vote on matters as a member of the governing body of the organization.

certain business interests in the exercise of their duties affecting those same interests is antithetical to the Public Ethics Law. The AHCMC is a grants organization: it receives money from the County government (and others) and disburses it through grants to arts and humanities organizations. The AHCMC website states that the AHCMC annually distributes over \$3.5 million in grants to organizations and individuals to help fund enriching cultural activities in our County. The County has appropriated close to \$3.3 million to the AHCMC in FY 12 and FY 13. We note that according to the AHCMC website, the entities represented in the Letter received over one million dollars of grants in 2012.

The conflict of interest provisions in the Public Ethics Law prohibit AHCMC Board Members from working on matters affecting organizations where those Board Members are an officer, director, trustee, partner, or employee. In other words, if a Board Member is an officer, director, trustee, partner, or employee of an organization seeking a grant or other action from the AHCMC, the Board Member would be prohibited from voting or otherwise participating in AHCMC consideration of the grant or other action that would impact the organization. A Board Member could not be involved in a decision to make a grant to such an organization or to fund the grant.

The Ethics Commission recognizes the peculiar nature of AHCMC under County law. The law identifies AHCMC as the designated entity for dispersing of County funds to arts and humanities entities, but does not establish the AHCMC as a government entity. The law also requires proximity between the board of directors and the arts and humanities community. The County Code at § 5A-4(b) stipulates that Directors of the Arts and Humanities Council must represent:

- (1) Private citizens, organizations, and groups recognized for their knowledge of or interest in the arts and humanities.
- (2) Practicing artists and writers, both professional and amateur; scholars and researchers; civic cultural leaders; members of the professions; and other individuals and groups concerned with the arts and humanities.
- (3) The various disciplines in the arts and humanities.
- (4) The general public, including ethnic, racial, linguistic, and cultural minorities.

The AHCMC law thus stipulates that the board members are to represent the community of persons involved in arts and humanities, but at the same time prohibits these persons from conflicts of interest. The Ethics Commission believes that the law provides for the appointment of persons knowledgeable and involved in the arts and humanities community, but without authorizing those persons to work on matters that would cause a conflict of interest under County law. Unless the law were changed to delete the application of conflict of interest laws to AHCMC Board Members and officers, these persons are “public employees” for purposes of the application of the conflict of interest and conduct laws found in §§ 19A-11 and 19A-14.

Finally, it may be that a Board Member could seek a waiver of the conflict of interest law from the Ethics Commission in accordance with the terms of § 19A-8 of the Public Ethics Law. The

Ethics Commission may grant waivers where it determines that the best interest of the County would be served by such a waiver.

For the Commission



Nina A. Weisbroth, Chair